STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2013
v	No. 308491 Oakland Circuit Court
TIMOTHY LEWIS HAYNES, Defendant-Appellant.	LC No. 2011-237176-FH

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of first-degree home invasion, MCL 750.110a(2). He was sentenced as a third-offense habitual offender, MCL 769.11, to serve 10 to 40 years' imprisonment. We affirm.

Defendant was arrested after Melissa Salaske and her friend Brian Bushman arrived at the home for which Salaske was house-sitting to find defendant sitting in a chair in the living room in the dark. Salaske had previously seen defendant at the bar that night and both had received a ride home from the same person weeks before. Salaske testified that she did not invite defendant to the home. Bushman testified that based on Salaske's reaction, he knew that defendant was not welcome in the home, so he attempted to subdue defendant until the police arrived. Defendant and Bushman fought until the police arrived, and defendant scratched Bushman's face and pulled his hair. Salaske testified that defendant pushed her on his way out of the home. Following a jury trial, defendant was convicted of first-degree home invasion.

I. SUFFICIENCY OF EVIDENCE

Defendant first argues that there was insufficient evidence to support his conviction. We review sufficiency-of-the-evidence claims de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), with an eye toward determining whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt, *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). In doing so, all evidence must be viewed in a light most favorable to the prosecution. *Id.* at 216. We defer to the fact-finder's weighing of the evidence and assessment of the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

MCL 750.110a(2) provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

In *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010), our Supreme Court discussed the several different ways first-degree home invasion could be committed, each involving alternative elements:

> The alternative elements of first-degree home invasion can be broken down as follows:
>
> Element One: The defendant *either:*
>
> 1. breaks and enters a dwelling or
>
> 2. enters a dwelling without permission.
>
> Element Two: The defendant *either:*
>
> 1. intends when entering to commit a felony, larceny, or assault in the dwelling or
>
> 2. at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault.
>
> Element Three: While the defendant is entering, present in, or exiting the dwelling, *either:*
>
> 1. the defendant is armed with a dangerous weapon or
>
> 2. another person is lawfully present in the dwelling.

In this case, there was sufficient evidence for a rational trier of fact to conclude that the essential elements of first-degree home invasion were proven beyond a reasonable doubt. First, there was evidence that defendant entered the home through a window, as evidenced by a broken piece of hedge found inside the home that clearly came from the freshly broken hedge outside. Additionally, the renter of the home and Salaske, the house sitter, testified that defendant did not have permission to enter the home. Second, there was evidence that defendant assaulted Bushman and Salaske while he was present in the home. An assault is "either an attempt to

commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). A battery is defined as "an intentional, unconsented and harmful or offensive touching" of another. *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998). Bushman testified that defendant was sitting in a chair in the dark and based on Salaske's reaction to defendant's presence, Bushman knew defendant was not welcome. Defendant got out of the chair, and Bushman testified that he was afraid of what defendant might do to him and Salaske. Therefore, even without touching Bushman, defendant placed Bushman in reasonable apprehension of receiving an immediate battery. Although defendant argues that he acted in self-defense, viewing the evidence in a light most favorable to the prosecution, defendant's pulling of Bushman's hair and scratching of Bushman's face were batteries. Further, viewing the evidence in a light most favorable to the prosecution, defendant's pushing of Salaske was also a battery. Lastly, there was evidence that another person, specifically Salaske, was lawfully present in the home. Thus, there was sufficient evidence to support defendant's conviction.

II. JURY INSTRUCTION ON SELF-DEFENSE

Next, defendant argues that the trial court erred by refusing to give a self-defense instruction to the jury. A trial court's "determination whether a jury instruction is applicable to the facts of the case" is reviewed for an abuse of discretion." *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

"Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). When asserting an affirmative defense, the defendant bears the burden to "produce some evidence on all of the elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). A criminal defendant is only entitled to a jury instruction if the evidence supports it. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

On appeal, defendant argues that CJI2d 7.16a, Rebuttable Presumption Regarding Fear of Death, Great Bodily Harm, or Sexual Assault, was the requested instruction and should have been given. However, at trial, it appears defendant actually requested CJI2d 7.22, Use of Nondeadly Force in Self-defense or Defense of Others, and not CJI2d 7.16a. In any event, there was no evidence to support either instruction.

CJI2d 7.16a is derived from MCL 780.951, which allows for a rebuttable presumption that an individual using force has an honest and reasonable belief that imminent death, sexual assault, or great bodily harm will occur. However, this presumption only applies when that force is used against another individual in the context of breaking and entering a dwelling, or to prevent another individual from unlawfully attempting to remove someone from a dwelling or vehicle against that person's will. MCL 780.951(1)(a). This presumption does not apply if the individual against whom the force is used has the legal right to be in the dwelling. MCL 780.951(2)(a). In this case, there was evidence that Salaske and Bushman had the legal right to be in the home, and defendant did not present evidence to the contrary. Accordingly, there is no evidence to support this instruction.

Likewise, there is no evidence to support CJI2d 7.22. The self-defense act, MCL 780.972, which guides CJI2d 7.22, provides in relevant part:

> (2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

In this case, there was evidence that defendant was engaged in the commission of a crime—unlawfully entering the home—at the time he used force against Bushman, and defendant did not provide evidence to the contrary. Defendant argues that he was invited to the home and was legally present. He relies on his statement made to a detective, in which he stated that Salaske invited him to the home and that he entered through an unlocked door to wait for her. When Salaske and another male entered the home, there was an exchange and the male attacked defendant for no reason. However, in both the opening and closing statements, defense counsel conceded that defendant was unlawfully in the home. Accordingly, the trial court did not abuse its discretion in denying defendant's request for a self-defense instruction where defendant conceded that he entered the home unlawfully.

III. USE OF PRIOR CONVICTION FOR IMPEACHMENT PURPOSES

Next, defendant argues that the trial court erred by ruling that his prior conviction was admissible for impeachment purposes should he testify. However, defendant waived this issue for appellate review because he did not testify. *People v Finley*, 431 Mich 506, 510; 431 NW2d 19 (1988). Defendant argues that the trial court's ruling affected his decision not to testify. However, "[a] reviewing court cannot assume that the defendant decided not to testify out of fear of impeachment by a prior conviction." *Id.* at 513. To avoid waiver of the issue, defendant must express an intention to testify if his prior conviction were excluded and state the nature of his expected testimony. *Id.* at 509-510. In this case, defendant did not do either. Instead, defendant expressly waived his right to testify on the record. Thus, this issue is waived.

IV. STANDARD 4 BRIEF

Defendant also raises three issues in propria persona in his supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4.

A. MOTION TO DISMISS

First, defendant challenges the trial court's denial of his motion to quash the information and dismiss the charge following the preliminary hearing in district court. We review a circuit court's decision on a motion to quash the information and a district court's decision to bind over a defendant for an abuse of discretion. *People v Hotrum*, 244 Mich App 189, 191; 624 NW2d 469 (2000). However, "[w]hile defendant argues that the trial court committed error by failing to quash the information, where a defendant has received a fair trial, appellate review is limited to the trial court's denial of the defendant's motion for directed verdict." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). In assessing a trial court's denial of a motion for a directed

verdict, we review the evidence in a light most favorable to the prosecution to "determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Riley* (*After Remand*), 468 Mich 135, 139-140; 659 NW2d 611 (2003). This is the same standard of review that is used to determine whether there was sufficient evidence to convict a defendant. Accordingly, because we determined in Part I, *supra*, that there was sufficient evidence for a rational trier of fact to conclude that defendant committed the crime of first-degree home invasion beyond a reasonable doubt, we find that the trial court's denial of defendant's motion for a directed verdict was proper, and consequently, his challenge to the sufficiency of the information must fail.

B. DISCOVERY VIOLATION

Defendant next argues that the trial court erred by denying his request to exclude the 911 tape as a discovery sanction for the prosecution's failure to produce the tape at least 14 days before the trial. A trial court's decision to admit evidence that violated a discovery requirement is reviewed for an abuse of discretion. MCR 6.201(J); *People v Jackson*, 292 Mich App 583, 591; 808 NW2d 541 (2011).

MCR 6.201(A)(6) makes it mandatory, upon request, for a party to provide the other party with "a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial."

> If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. [MCR 6.201(J).]

"When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

In this case, the prosecution was ordered to provide defendant with any recorded statement of a witness at least 14 days before trial. At a hearing before the first scheduled trial date, defendant requested that the 911 tape be excluded because it was not produced to him. The prosecution argued that defendant knew about the 911 tape because it was mentioned in the police reports, that the 911 tape was available to defense counsel at the police department, and that he sent the recording to defense counsel attached to an email. Defense counsel argued that he did receive the email, but the recording was not attached and he made the prosecution aware of this. After listening to the recording of the 911 tape, the trial court found that it contained no new information that was not presented at the preliminary examination, and therefore, defendant was not prejudiced by the late production. However, the trial court still granted defendant a 14-day adjournment because of the late production. This was an appropriate remedy under MCR 6.201(J). Further, given that the prosecution partially complied with the order by attempting to send the recording attached to an email, that the 911 tape was available at the police department, and that there was no showing by defendant of any actual prejudice, especially where defendant

was granted an adjournment, we find no abuse of discretion in the trial court's decision to admit the 911 tape.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, defendant argues that defense counsel was ineffective for failing to call Deputy Stoner as a witness. "Because defendant did not raise this issue in a motion for a new trial or request an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). "The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *Id.*

To establish ineffective assistance of counsel, defendant must show: (1) "that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness," and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel's performance. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "[T]he failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation marks and citation omitted). A substantial defense is one that could have made a difference in the outcome of the trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999).

Here, defendant claims that his counsel was ineffective for failing to investigate and call as a witness Deputy Stoner, who was the first officer on the scene. Defendant claims that Deputy Stoner believed that Salaske and Bushman were lying to him and only arrested defendant because he had outstanding warrants. However, there is no record before this Court regarding what Deputy Stoner's testimony might have been and no mistakes are apparent on the record with respect to defense counsel's failure to call Deputy Stoner. "Moreover, the failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy." *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). Based on the record, we cannot find that defendant was denied the effective assistance of counsel.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood